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Supreme Court, U.S.
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No. 88-732

In the Supreme Court of the United States

OCTOBER TERM, 1988

HARRY B. HELMSLEY AND
LEONA A. HELMSLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether an order denying a motion to dismiss an indictment for alleged violations of Fed. R. Crim. P. 6(e) may be immediately appealed, prior to the entry of a final judgment of conviction and sentence, under the collateral order doctrine.

2. Whether petitioners were entitled to discovery to determine whether they were prejudiced by the alleged Rule 6(e) violations.

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OPINIONS BELOW

The order of the court of appeals dismissing petitioners' appeal for lack of jurisdiction (Pet. App. 1a-2a) is unreported. The court of appeals has not yet issued an opinion in support of its order. The order of the district court (Pet. App. 3a) is unreported.

JURISDICTION

The order of the court of appeals was entered on September 14, 1988. The petition for a writ of certiorari was filed on November 1, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Harry B. Helmsley is the President and sole shareholder of Helmsley Enterprises, Inc. Petitioner Leona A. Helmsley is the President of Helmsley Hotels, Inc., a wholly owned subsidiary of Helmsley Enterprises. On April 14, 1988, a federal grand jury in the Southern District of New York returned a 47-count indictment against petitioners, together with co-defendants Joseph V. Licari and Frank J. Turco. The indictment charged the defendants with conspiracy to commit offenses against the United States and to defraud the United States and the Internal Revenue Service, in violation of 18 U.S.C. 371; willfully attempting to evade and defeat taxes, in violation of 26 U.S.C. 7201; aiding and abetting petitioners in their attempts to evade personal income taxes, in violation of 26 U.S.C. 7201; willfully making and subscribing false individual tax returns (Forms 1040), in violation of 26 U.S.C. 7206(1); willfully aiding and assisting in the preparation and presentation of false individual, corporate, and partnership tax returns, in violation of 26 U.S.C. 7206(2); mail fraud, in violation of 18 U.S.C. 1341; and extortion, in violation of 18 U.S.C. 1951. See Indictment at 1; Gov't C.A. Br. 1-2.

On June 17, 1988, petitioners moved to dismiss the indictment. They contended that the government had violated Fed. R. Crim. P. 6(e) by publicly disclosing details of the grand jury investigation. In support of their motion, petitioners cited numerous newspaper articles that appeared before, during, and after the investigation, in which information was occasionally attributed to government sources. Petitioners also requested a hearing to determine whether the grand jurors had been exposed to, or influenced by, the publicity.

On July 19, 1988, following a hearing, the district court denied petitioners' motion to dismiss the indictment (Pet. App. 4a-29a). Although the court agreed that the case "was rife with Rule 6 violations" (*id.* at 14a), it concluded (*id.* at 25a) that petitioners had failed to present "persuasive evidence of government conduct that caused actual prejudice," as required by this Court's decision in *Bank of Nova Scotia* v. *United States,* No. 87-578 (June 22, 1988). The court explained (Pet. App. 26a) that petitioners had "offered no evidence that any violations of Rule 6(e) either substantially influenced the grand jury's decision or that there is grave doubt whether the decision to indict was free from such substantial influence." The court also denied petitioners' request to poll the grand jurors to determine whether they had been prejudiced by the publicity about the case (*id.* at 28a-29a).

2. The court of appeals dismissed petitioners' appeal for want of appellate jurisdiction (Pet. App. 2a). In its order dismissing the appeal, the court indicated that it would file a formal opinion "in due course" (*ibid.*). As of the date of this filing, the court of appeals has not yet issued an opinion.

ARGUMENT

1. The court of appeals dismissed petitioners' appeal for want of appellate jurisdiction, apparently in reliance on its earlier decision in *United States* v. *Midland Asphalt Corporation,* 840 F.2d 1040 (2d Cir. 1988). This Court has granted a petition for a writ of certiorari in *Midland Asphalt,* No. 87-1905 (June 27, 1988), and the case is presently scheduled for oral argument on January 17, 1989. For the reasons set out in our brief in *Midland Asphalt,*[1] we believe that the court of appeals correctly

[1] A copy of the government's brief in *Midland Asphalt* has been furnished to petitioners.

dismissed petitioners' appeal. We agree with petitioners, however, that the first question presented in the petition—whether the denial of a Rule 6(e) motion to dismiss is immediately appealable under the collateral order doctrine—is the same question presented to this Court in the *Midland Asphalt* case. We therefore agree with petitioners that the first question in this case should be disposed of in light of the Court's decision in *Midland Asphalt*.[2]

2. Petitioners also ask the Court (Pet. 10-11) to decide what, if any, procedures are available to a defendant who seeks to show that a grand jury was unduly influenced by Rule 6(e) disclosures. That question is simply not presented in this case. In light of its disposition of the jurisdictional issue, the court of appeals did not address petitioners' discovery request. In any event, petitioners offer no support for the claim that they were entitled to a hearing or to discovery on the issue of grand jury prejudice. They argue (Pet. 10) that the Court should prescribe standards to govern discovery for defendants who have made "a *prima facie* showing of prejudicial governmental misconduct" during a grand jury investigation. As the district court concluded (Pet. App. 25a-26a), however, petitioners adduced no evidence—let alone made "a *prima facie* showing"—that the grand jury's decision was affected by pretrial publicity. Further review of this issue is therefore unwarranted.

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[2] There is no reason, however, to accept petitioners' request (Pet. 3) that plenary review be granted in this case and that the case be consolidated for argument with *Midland Asphalt*. Even if this case otherwise merited such treatment, *Midland Asphalt* has already been fully briefed and is scheduled for argument on January 17, 1989. Consolidating this case with *Midland Asphalt* would not serve the purpose of presenting the appealability issue any better than it is presented in *Midland Asphalt*, and it would cause a long delay in the disposition of that case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of this Court's decision in *Midland Asphalt Corporation* v. *United States,* cert. granted, No. 87-1905 (June 27, 1988).

Respectfully submitted.

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